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No. 90-

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

ELISA COSGROVE

Petitioner,

vs.

KANSAS STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Respondent.

and

IN THE INTEREST OF L.C. AND C.C. CHILDREN UNDER THE AGE OF 18 YEARS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a natural parent whose parental rights have been terminated without due process of law has a right under the equal protection clause of the 5th and 14th Amendments to seek Habeas Corpus relief under the applicable Kansas statute, K.S.A. 60-1501, et seq.

2. Whether the totality of the circumstances leading to the severance of Petitioner's parental rights and the Court's disassociation of Petitioner from her natural children violates the constitutional protections of due process and fundamental fairness guaranteed by the Fifth and Fourteenth Amendments.

3. Whether the Fourth, Fifth, Sixth, Seventh and Fourteenth Amendments to the Constitution mandate trial by jury in State severance of parental rights proceedings.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the Kansas Appellate Courts, with the exception of the minor children of Petitioner from whom Petitioner's parental rights have been severed, are shown by the caption of this action.

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ELISA COSGROVE

Petitioner,

vs.

KANSAS STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner, Elisa Cosgrove, respectfully prays that a writ of certiorari issue to review the judgment of the Kansas Supreme Court which affirmed the dismissal of her State Habeas Corpus Petition and Motion for Relief from Order Severing Parental Rights.

OPINIONS BELOW

The decision of the Supreme court of the State of Kansas, rendered April 24, 1990, denying Petitioner's Petition for Review of the Kansas Court of Appeals decision, Appendix "D", has not yet been published. It

affirmed the judgment of the Court of Appeals of the State of Kansas, reported at 14 Kan. App. 2d 217 (1990), Appendix "A", upholding the judgment of the District Court of Johnson County, Kansas, which dismissed a habeas corpus action brought to secure the release of the children of Petitioner being held by Respondent, Appendix "B", and the judgment of the Probate Court of Johnson County, Kansas, which dismissed a Motion for Relief from Order Severing Parental Rights, Appendix "C"

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The opinion of the Kansas Court of Appeals was rendered February 9, 1990. The Supreme Court of the State of Kansas denied review by summary determination on April 24, 1990. The decision of the Kansas Supreme Court has not yet been published.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9:

> The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public safety may require it.

Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures shall not be violated.

Amendment V:

> [N]or shall any person be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . . .

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . .

Amendment VII:

> In suits at common law, where the value in controversy shall exceed Twenty Dollars, and right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Amendment IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

42 United States Code, §1983.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any

> State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Kansas Statutes Annotated, §60-1501. Jurisdiction and Right to Writ.

> Subject to the provisions of K.S.A. 60-1507 [prisoners in custody under sentence] and person in this state who is detained, confined, or restrained of liberty on any pretense whatsoever, and any parent, guardian or next friend for the protection of infants or allegedly incapacitated or incompetent persons, physically present in this state may prosecute a writ of habeas corpus in the Supreme Court, Court of Appeals or the District Court of the county in which such restraint is taking place. No docket fee shall be required.

STATEMENT OF THE CASE

During February, 1984, Charles Cosgrove initiated divorce proceedings in Johnson County, Kansas, against Petitioner in which he obtained ex parte orders awarding him temporary custody of the parties' minor Children, Lorie C. and Charles C., Jr. The divorce proceedings developed into a bitter custody battle in which allegations of child abuse and mental incompetency were exchanged. At one time during the proceedings, Charles Cosgrove threatened that he would ensure Petitioner would never again see her son.

In early 1984, Charles Cosgrove falsely reported to the Division of Social and Rehabilitation Services that Petitioner had sexually molested the children. Between April 6, 1984, and June 24, 1985, the children were repeatedly and persistently interrogated and questioned about the alleged physical and sexual abuse of them by Petitioner, which they denied. Through continual interrogation and suggestive questioning, the children eventually agreed with the SRS staff that they had been abused. Charles Cosgrove later retracted his statements that Petitioner had sexually or physically abused the children.

On June 24, 1985, a Criminal Information was filed against Petitioner in the District Court of Johnson County, Kansas, alleging violations of K.S.A. 21-3506 and K.S.A. 21-4501(b) [Aggravated criminal sodomy]. Thereafter, on May 8, 1986, a Petition for Severance of Parental Rights was filed in the District Court of Johnson County, Kansas, seeking to permanently sever Petitioner's parental ties with her children, Lorie C. and Charles C., Jr. The allegations of the severance action were substantially similar to the contentions of the Criminal Information.

On October 6, 1986, while the criminal charges were still pending against Petitioner, a trial for severance of Petitioner's parental rights was commenced. Due to the pendency of the criminal charges against her, on advice of counsel, Petitioner asserted her Fifth Amendment right not to testify in her own behalf. As a result of that hearing, the Johnson County District Court, Thomas C. Owens, presiding, on December 8, 1986, found against Petitioner and severed her parental rights. An appeal was

filed which resulted in the Kansas Appellate Court affirmance of the District Court decision terminating Petitioner's parental rights on July 8, 1988.

In the meantime, the criminal charges against Petitioner proceeded to trial. After an initial verdict was overturned by the trial judge "due to a multiplicity of errors", Petitioner was acquitted of all charges against her on May 5, 1987.

Thereafter, on February 9, 1989, Petitioner filed her Petition for Writ of Habeas Corpus, K.S.A. 60-1501 et seq, alleging that the Order severing her parental rights were void and violative of her constitutional rights for a multiplicity of reasons, including:

(1) The order of the Probate Court severing Petitioner's parental rights and directing the Department of Social and Rehabilitation Services to detain, confine, restrain or possess Petitioner's minor children is void, unenforceable, illegal, and in violation of the Constitution and laws of the United States and of the State of Kansas.

(2) Actual bias and prejudice against Petitioner by Judge Pro Tem Thomas C. Owens.

(3) Petitioner was denied effective assistance of counsel.

(4) By exercising her constitutional rights to remain silent in the face of criminal proceedings, Petitioner was deprived of her ability to defend her parental rights by testifying on her own behalf.

(5) By consolidating the action to sever Petitioner's parental rights with an action to sever the parental rights of her former husband, Charles Cosgrove, a convicted sex offender, Petitioner's defense was irreparably prejudiced.

(6) Manufactured and false evidence was presented at trial by the Department of Social and Rehabilitation Services, expert witnesses, and the minor children to the effect that Petitioner had sexually molested the minor children, when in fact no molestation had occurred.

(7) The "ongoing emotional impact" of the Child in Need of Care proceedings was improperly considered as a factor in severing Petitioner's parental rights.

(8) Petitioner was denied trial by jury.

(9) The judgment of the Probate Court was obtained by fraud.

Without allowing Petitioner to present any evidence in support of her allegations, the District Court granted the State's Motion to Dismiss on March 13, 1989, on the basis that Petitioner was no longer a "parent" and had no sufficient separate interest in having the issues determined of which she complained, and that ineffective assistance of counsel does not state a valid cause of action.

Thereafter, on June 8, 1989, Petitioner filed a Motion for Relief from Order Severing Parental Rights in the Probate Division of the Johnson County, Kansas District Court pursuant to K.S.A. 60-260(b) [relief from judgment]. Without allowing Petitioner any discovery or the right to present evidence on her behalf, the Probate Court summarily dismissed this Motion on October 6, 1989.

Subsequent to the severance of Petitioner's parental rights, information was provided to Petitioner's counsel that a document in the Johnson County Sheriff's Department [Offense/Incident Report No. DN 98408, dated January 31, 1986) established actual prejudice and personal

bias on the part of Judge Pro Tem Thomas C. Owens. According to the document (which has not been produced to Petitioner), on January 31, 1986, Detective Frank Denning of the Johnson County Sheriff's Department, interviewed Thomas C. Owens. In the document it is reported, "Tom [Thomas C. Owens] believes that ___ , ___, and Elisa Cosgrove has helped members of KPACT abduct the minor child in the *Ottremari* case and have her in hiding". In the *Ottremari* case, Thomas C. Owens was the Guardian Ad Litem for the allegedly abducted child. Simultaneously, with filing her Motion for Relief, Petitioner served a subpoena duces tecum on Detective Frank Denning requesting that he produce the subject document. Without requiring production of the document, The Honorable Bill Haynes granted Respondent's Motion to Dismiss Petitioner's Motion for Relief of Order Severing Parental Rights on June 26, 1989. In "dismissing" Petitioner's Motion, the Court held, "the grounds stated in the Motion for Relief from Order Severing Parental Rights have been previously before the Court, rulings on those grounds sustained on appeal, and the Court now has no jurisdiction to grant the relief requested".

The reference in the Court's ruling is to a hearing held on October 6, 1986, in which Thomas C. Owens responded to Charles C. Cosgrove's Affidavit pursuant to K.S.A. 20-311(d) [change of judge] requesting recusal of Judge Owens on the basis of prejudice and impropriety. Although Judge Owens did make a statement at that hearing regarding his involvement in the *Ottremari* case, his statements are directly contradicted by the requested document in the possession of the Johnson County

Sheriff's Department to which Petitioner was denied access. For example, Judge Owens stated at the hearing:

> . . . . *I wouldn't be able to identify either of the parents in this particular case,* and other than the files that I have available to me, I have no prior knowledge at all about the case involving the parties herein." (Transcript of Proceedings, October 6, 1989, p. 12) (Emphasis supplied)

The transcript of proceedings on October 6, 1986, is also significant in another respect. At that time Petitioner was represented by Court-appointed counsel, Edward V. Byrne. At the hearing, Mr. Byrne stated, "On my recommendation to Mrs. (sic) Cosgrove just last week, she agreed not to press the affidavit issue and that's why we have not joined it". (Transcript proceedings, Oct. 6, 1989, p. 7) In that same hearing, the following exchange took place:

Mrs. Cosgrove:	I would give anything if I could receive another Judge in this case because of my girl friend's – Susan's – case that you handled and Tim Owens was in it. Mr. Byrne believes – I don't believe . . . .
The Court:	So I understand, ma'am, you really have some concerns with proceeding with the matter than today?
Mrs. Cosgrove:	I am very concerned.
The Court:	You are concerned then about having the matter being presided over by Thomas C. Owens, is that correct?
Mrs. Cosgrove:	Yes, Your Honor.

Following severance of her parental rights by Judge Pro Tem Thomas C. Owens, Petitioner retained new counsel to pursue an appeal. Attorney David K. Fromme represented Petitioner on that appeal raising, among other things, the personal bias of Judge Owens. In the appellate decision, No. 60,346, the Court of Appeals held:

> *At the hearing on the father's Affidavit, counsel for E.C. stated that she did not join in the Affidavit. E.C.'s contention on appeal that the Judge Pro Tem should have been reclused is inconsistent with her position in the trial court.*
>
> . . . .
>
> *E.C.'s express refusal to join in C.C. Sr.'s Affidavit precludes her claims of error on appeal.* (Emphasis supplied)

REASONS FOR GRANTING THE WRIT

The Kansas Supreme Court had decided substantial and important questions of Federal law which should be, but have not been, settled by this court, including whether a natural parent has a sufficient personal interest in parental rights termination proceedings to allow them to challenge the efficacy of the proceedings by means of habeas corpus and the nature and extent of the Due Process Rights of such a parent in termination proceedings.

Judge Adams, in a concurring opinion in *Lehman v. Lycoming County Children's Services*, 648 F.2d 135 (3d Cir. 1981), stated the need for determination of this very question:

> The District Court, in a preliminary order, denied the respondent's contention that Lehman had no standing, and the parties did not raise the issue on appeal. But while Mrs. Lehman has a sufficient personal interest in getting the present habeas relief she seeks, the question of whether she is a sufficiently appropriate representative of the other interested parties – the children – is a difficult one, given the context of overlapping yet potentially conflicting parent and child interests. Not only does the problem deserve to be addressed, but a court of appeals may affirm a district court's decision on a different ground from that assigned by the trial court.

Lehman v. Lycoming County Children's Services, 648 F.2d 135, 151 n. 30 (3d Cir. 1981). *See also Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 525 n. 9 (1982) (Brennan, J., dissenting)

I. WHETHER A NATURAL PARENT WHOSE PARENTAL RIGHTS HAVE BEEN TERMINATED WITHOUT DUE PROCESS OF LAW HAS A RIGHT UNDER THE EQUAL PROTECTION CLAUSE OF THE 5TH AND 14TH AMENDMENTS TO SEEK HABEAS CORPUS RELIEF UNDER THE APPLICABLE KANSAS STATUTE, K.S.A. 60-1501, ET SEQ.

The Supreme Court of Kansas has effectively classified parents whose children are wrongfully taken from them by State action in a separate category from parents whose children are wrongfully taken from them by anyone other than the State of Kansas. The Court should grant the Writ to determine whether the classification and attendant consequences of its application deny Petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment.

K.S.A. 60-1501 provides in pertinent part:

> . . . . [A]ny parent, guardian or next friend for the protection of infants or allegedly incapacitated or incompetent persons, physically present in this state may prosecute a writ of habeas corpus in the . . . district court of the county in which restraint is taking place . . . .

The constitutional right to habeas corpus is contained in Section 8 of the Bill of Rights in the Kansas Constitution and in Article I, Section 9 of the United States Constitution. Although the remedy is not normally available to interfere with the courts in the exercise of their jurisdiction, the writ is a valid vehicle for collaterally attacking a sentence or judgment resulting from a violation of due process of law. (See Gard, *Kansas Rules of Civil Procedure 2d*, Article 15, p. 105.) The remedy is an appropriate one for collaterally attacking the Order severing Petitioner's parental rights. As stated in Gard, *Kansas Rules of Civil Procedure 2d:*

> The application of the remedy is broadened somewhat, or at least made plain, by the express recognition of jurisdiction for the protection of infants and allegedly incapacitated or incompetent persons who are "physically present in this state". The provision should be read along with that of section 60-1505(d) permitting the court to make such other orders (besides release from restraint of transfer of custody) "as justice and equity or the welfare of a minor physically present in the state may require."
>
> . . . .
>
> The purpose of habeas corpus is to provide an efficient and prompt remedy to obtain freedom from illegal restraint, or from illegal restraint, or from restraint imposed in the abuse of legal

> authority processes. Thus, habeas corpus does not take the place of the motion for new trial to correct trial errors, not is it a substitute for an appeal or motion for rehearing. See *Andrews v. Hand*, 190 K 109, 372 P.2d 559, cert den 371 US 880, 9 L.Ed.2d 117, 83 S.Ct. 152. While a court of competent jurisdiction is functioning within the scope of its jurisdiction that court will determine the propriety of the restraints imposed in that action, subject to appellate review, and subject to the restraints being in the course of due process of law. Restraint resulting from a void judgment is reached by habeas corpus. See *Re Spaulding*, 75 K 163, 88 P 547. Or the remedy is available to inquire into the jurisdiction of a Court to act. See Re *Bolman*, 131 K 593, 292 P. 790; Re *Rockwood*, 146 K 386, 69 P.2d 703: *Whalen v. Cristelli*, 161 K 747, 173 P.2d 252.
>
> *Gard*, Article 15, p. 105-106

Jurisdiction over habeas corpus proceedings in child custody matters has been upheld by the Kansas Appellate Courts on many occasions, including: *Anderson v. Anderson*, 214 Kan. 387, 391, 520 P.2d 1239; *Beebe v. Chaver*, 226 Kan. 591, 597, 598, 602 P.2d 1279; *In re Adoption of Wilson*, 227 Kan. 803, 806, 610 P.2d 598.

The ability of Petitioner to challenge the unconstitutional manner by which her parental rights were severed is seriously jeopardized by the Kansas Courts' decision finding that a natural parent whose parental rights have been severed has no protectable interest under which she can assert rights under the Kansas habeas corpus statute. It is a substantial and important question of Federal and constitutional law whether a natural parent can be deprived of her right to collaterally attack a State court judgment severing parental rights *solely on the basis that*

the allegedly defective judgment terminated her status as "parent", and, therefore, her standing to assert denials of due process in the original proceeding. The United States Supreme Court has consistently held that parents have a fundamental constitutional liberty interest in the care, custody and management of their children. *Stanley v. Illinois,* 405 U.S. 645 (1972); *Santosky v. Kramer,* 455 U.S. 745 (1982); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

In *Lehman v. Lycoming County Children's Services Agency,* 458 U.S. 502 (1982) the Court was faced with a question as to whether the Federal habeas corpus statute, 28 U.S.C., §2254, could be invoked to challenge the constitutionality of a state statute under which the state had obtained custody of children and involuntarily terminated the parental rights of their natural parent. The Court there determined that the "custody" requirement of the Federal statute was not met and, therefore, Federal habeas was inapplicable.

The State of Kansas, as do a number of other states, provides a mechanism by which a parent, deprived of the care and companionship of a child, can bring a habeas corpus action to regain custody of that child. K.S.A. 60-1501. *See also Mich. Comp. Laws,* §600.419. In the present case, however, the Kansas Court of Appeals determined that a natural parent, after proceedings to terminate her rights have been completed, had no right, as a "parent", to petition the courts for a review of alleged constitutional deprivation.

In its decision denying relief to Petitioner the Kansas Court stated:

> In this appeal, Mrs. Cosgrove appears to present a novel argument. She maintains that her own liberty has been restrained. She notes that in *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982), the Supreme Court recognized the "fundamental liberty interest of natural parents in the care, custody and management of their child[ren]". Her argument appears to be that K.S.A. 60-1501 allows a petition for writ of habeas corpus when any person's "liberty is restrained" and that her own personal liberty is restrained. Therefore, she argues, she is not bringing the action for the protection of the child, but in her own right.
>
> This stretches the concept of "liberty". Most Kansas cases concerning liberty at least implicitly refer to physical liberty.

Cosgrove v. Kansas Department of S.R.S., 14 Kan. App.2d at 220.

However, as stated by Justice Scalia in *Michael H. V. Gerald D.*, ___ U.S. ___, 105 L.Ed.2d 91, 105 (1988):

> It is an established part of our constitutional jurisprudence that the term "liberty" in the Due Process Clause extends beyond freedom from physical restraint.

The result of the Kansas Courts' denial of standing to Petitioner to obtain habeas corpus relief from the judgment terminating her parental right based solely upon the fact that her parental rights have already been terminated, has been to deny Petitioner any ability to have determined the substantial constitutional issue of whether she is entitled to fundamental fairness in judicial proceedings, including a fair and impartial trier of fact, effective assistance of counsel, proceedings free from

bias, trial by jury, and prejudice the right to confront witnesses.

By this decision, the Kansas appellate courts have determined that, although every person whose rights may be affected by the State's attempt to sever parental rights is entitled to be represented by counsel (*In re Cooper*, 230 Kan. 57, syl. 4, 5, 63 P.2d 632 (1981), if it is later alleged that the legal representation obtained was inadequate, there is no way of challenging the miscarriage of justice, even though the United States Supreme court has long recognized that "the right of counsel is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *Reece v. Georgia*, 350 U.S. 85, 90 (1955).[1]

Since the very purpose of habeas corpus is to collaterally attack as existing judgment or sentence, it is error to rule that Petitioner lacks standing simply on the basis of the preexisting judgment. It is the existence of that judgment itself that Petitioner contests. Since Petitioner claims the judgment of the Probate Court is invalid and was granted in violation of her procedural and substantive due process rights, habeas corpus is the proper vehicle with which to seek that declaration. To dismiss the

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[1] In affirming the district court's dimissal of the habeas corpus petition, the Kansas Court of Appeals stated "ineffective assistance of counsel in a civil action does not present a valid cause of action." (*See* App. 3) However, the Kansas appellate courts have consistently ruled that claims of ineffective assistance of counsel can only be heard in habeas corpus actions and not on direct appeal. *State v. Myrick*, 228 Kan. 406, 616 P.2d 406 (1980).

Petition for Habeas Corpus on the authority of the judgment which the action seeks to vacate simply nullifies the right to habeas corpus for parents whose rights are severed by the State. Under the allegations of the habeas corpus petition, Petitioner does have standing and should be permitted to proceed on the merits of her claim.

In her habeas corpus action, Petitioner contends in numerous respects that the Order of the Probate Court severing her parental rights was the result of serious constitutional and due process violations. A statute, order or judgment in violation of the Constitution is void and should be set aside. This is particularly true where the rights involved are of the importance and magnitude of those which Petitioner was deprived. The Petition for Writ of Habeas Corpus does state a claim upon which relief can be granted.

A parent has a natural, God-given legal right to enjoy the custody, fellowship and companionship of his offspring. The United States Supreme Court has established the parent/child relationship as a constitutionally protected liberty interest. *In Santosky v. Kramer*, 455 U.S. 745 (1982), the Court stated:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irreparable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting State intervention into ongoing family

> affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

The destruction of a parent/child relationship, whether resulting from a custody/visitation dispute or a criminal prosecution on false criminal charges, is so critical to the fiber of our society that the courts should go to extremes to avoid erroneous destruction of trust relationship.

II. WHETHER THE TOTALITY OF THE CIRCUMSTANCES LEADING TO THE SEVERANCE OF PETITIONER'S PARENTAL RIGHTS AND THE COURT'S DISASSOCIATION OF PETITIONER FROM HER NATURAL CHILDREN VIOLATES THE CONSTITUTIONAL PROTECTIONS OF DUE PROCESS AND FUNDAMENTAL FAIRNESS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

The Fifth Amendment provides:

> [N]or shall nay person be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . . .

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

Petitioner's parental rights were severed on December 8, 1986, by Order of the Probate Court of Johnson County, Kansas, Judge Pro Tem Thomas C. Owens presiding. Subsequently, in May of 1989, Petitioner learned that Judge Pro Tem Thomas C. Owens had filed a Sheriff's Department Offense/Incident Report shortly before his appointment as Judge on Petitioner's case accusing Petitioner of kidnapping a minor child for which Mr. Owens was guardian ad litem. In the report, Mr. Owens further accused Ms. Cosgrove of involvement in a radical organization, Keeping Parents and Children Together (KPACT), which actively interferred with the State custody of children in need of care. Ms. Cosgrove was not a member of that organization.

Petitioner also raised numerous other allegations of due process denials in her original trial including:

(1) Denial of fundamental fairness in judicial proceedings;

(2) Actual bias and prejudice against Petitioner by Judge Pro Tem Thomas C. Owens;

(3) Petitioner was denied effective assistance of counsel

(4) By exercising her constitutional rights to remain silent in the fact of criminal proceedings, Petitioner was deprived of her ability to defend her parental rights by testifying on her own behalf.

(5) By consolidating the action to sever Petitioner's parental rights with an action to sever the parental rights of her former husband, Charles Cosgrove, a convicted sex offender, Petitioner's defense was irreparably prejudiced;

(6) Manufactured and false evidence was presented at trial by the Department of Social and Rehabilitation Services, expert witnesses, and the minor children to the effect that Petitioner had sexually molested the minor children, when in fact no molestation had occurred;

(7) The "ongoing emotional impact" of the Child in Need of Care proceedings was improperly considered as a factor in severing Petitioner's parental rights;

(8) Petitioner was denied trial by jury; and

(9) The judgment of the Probate Court was obtained by fraud.

On June 8, 1989, Petitioner filed a Motion for Relief from Order Severing Parental Rights in the Probate Court of Johnson County, Kansas, under K.S.A. 60-260(b), which provides:

> On motion and upon such terms as are just, the Court may relieve a party or said party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

K.S.A. 60-260(b)(6) allowing the Court to relieve a party from final judgment for "any other reason justifying relief from the operation of the judgment" is to be liberally construed.

As stated in 7 *Moore's Federal Practice*, §60.27(1), p. 342 (2nd Ed. 1982):

> Like Rule 60(b) generally, clause (6) should be liberally applied to situations not covered by the

> preceding five clauses so that, giving due regard to the sound interest underlying the finalizing of judgments, the district court, nevertheless, has power to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice.

See also: *Overland Park Savings and Loan Ass'n. v. Braden*, 626 P.2d 797 (1981); *Chowning, Inc. v. Dupree*, 626 P.2d 1240 (1981).

In response to Petitioner's Motion, the Johnson County Sheriff's department filed a Motion to Quash Petitioner's subpoena to obtain testimony of the Sheriff's officer who took the Offense/Incident report complaint from Thomas C. Owens and the State of Kansas filed a "Motion to Dismiss Motion for Relief from Order Severing Parental Rights". The Court quashed Petitioner's subpoena and without allowing Petitioner to present any evidence whatsoever on her Motion sustained the State's "Motion to Dismiss Motion for Relief from Order Severing Parental Rights". (See Appendix "C").

Petitioner contends that the unilateral dismissal of her Motion further exacerbates a long line of due process violations that occurred throughout her termination proceedings, and that the dismissal of the Motion under the circumstances constitutes additional violations of the Fifth and Fourteenth Amendments and 42 U.S.C. §1983.

Fundamental fairness in judicial proceedings has long been recognized by this Court as a basic requirement of due process. *Lassiter v. Department of Social Services of Durham County, North Carolina*, 101 S.Ct. 2153, 452 U.S. 18, 68 L.Ed.2d 640, rehearing denied, 102 S.Ct. 889, 453 U.S.

927, 69 L.Ed.2d 1023 (1981) The manner of the court's denying Petitioner's request for hearing on her Motion exemplifies consistent disregard for Petitioner's pleas for fair and impartial hearing and due process of law.

Petitioner is unfamiliar with what authority the Court had to "dismiss" a Motion to Dismiss" without allowing Petitioner to proceed with having the Motion heard. At a minimum, Petitioner should have been permitted to obtain the document in question and proceed with the hearing. Furthermore, Petitioner contends she is entitled to proceed with some minimum discovery in order to see what other evidence of personal bias and prejudice may be contained in the Sheriff's Department file on Ms. Cosgrove.

In his Findings of Fact and Conclusions of law, the Court found that the same allegations were litigated during proceedings on October 6, 1986. Petitioner was denied the right to pursue discovery of the Sheriff's Offense Report, which Petitioner contends documents not only Judge Pro Tem Thomas C. Owens' actual bias and prejudice against Petitioner but documents the fact that Judge Pro Tem Thomas C. Owens concealed the true nature of his bias by informing Judge Walton at the October 6, 1986, hearing, "I wouldn't be able to identify either of the parents in this particular case . . . . " (Transcript of Proceedings, October 6, 1986, page 12) Nine months earlier in his capacity as guardian ad litem, Thomas C. Owens, named Elisa Cosgrove as the individual responsible for abducting the child for whom Thomas C. Owens was guardian ad litem.

Finally, Petitioner contends that the Court's reliance on the "ongoing emotional impact" of the Child in Need of Care Proceedings as a basis for severance constitutes an impermissible consideration in terminating parental rights. Essentially, the Court is justifying the severance of Petitioner's parental rights by concluding that, right or wrong, the effect of the proceedings themselves – not the fitness of the parent – is determinative on the issue of fitness.

III. WHETHER THE FOURTH, FIFTH, SIXTH, SEVENTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION MANDATE TRIAL BY JURY IN STATE SEVERANCE OF PARENTAL RIGHTS PROCEEDINGS.

A parent's rights to Due Process and a fair trial of charges in the nature of criminal charges are seriously damaged when the State denies the right to jury trial on such charges.

Among the contentions in the present case is that Petitioner should have had, but did not have, a jury trial on the allegations against her which led to the severance of her parental ties. The Kansas Courts have consistently held that a parent has no constitutional right, either Federal or state, to a jury trial in any action pursuant to the Code for Care of Children, under which Petitioner's parental ties were severed. *Findlay v. State*, 235 Kan. 462, 463, 681 P.2d 20 (1984); *In re McCoy*, 184 Kan. 1, 8-9, 334 P.2d 820 (1959). Although a number of state courts have been faced with this issue, the Supreme Court has never

decided whether participants in parental rights termination proceedings are entitled to a jury trial under the Federal Constitution.

The due process clause of the Fifth and Fourteenth Amendments to the United States Constitution require fundamental fairness. *In re Murchison*, 349 U.S. 133 (1955). The dissolution of the parent-child relationship has consistently been recognized by the courts as a punitive sanction by the courts. *Davis v. Page*, 640 F.2d 599, 604 (5th Cir. 1981) (en banc); *State ex rel v. Oakley*, 157 W.Va. 590, 598, 203 S.E.2d 140, 144 (1974); *In re Howard*, 382 So.2d 194, 199 (La. App. 1980). *See also* Note, *Child Neglect; Due Process for the Parent*, 70 Colum. L. Rev. 465, 478 (1970). Also, as noted by Justice Brennan in his dissent in *Lassiter v. Department of Social Services*, the procedure used in parental rights termination proceedings, in many respects, resembles a criminal prosecution. *Lassiter v. Department of Social Services*, 452 U.S. 18, 42 (1981) (Brennan, J. dissenting).

In Petitioner's situation the charges which formed the basis for the severance of parental rights petition also formed the basis for the criminal charges on which she was acquitted. Even though the jury acquitted Petitioner on her criminal charges, Judge Pro Tem Thomas C. Owens served Petitioner's parental rights before she was finally tried on her criminal charges. This case vividly illustrates the importance of a jury trial in cases where separation of parents and their children is a likelihood. It was only after Petitioner's parental rights were severed that Petitioner learned Judge Pro Tem Thomas C. Owens had filed a Sheriff's Department Offense/Incident report alleging that Petitioner was responsible for kidnapping a

child for whom he had been appointed guardian ad litem in his capacity as private attorney Two short months later Thomas C. Owens was appointed Judge Pro Tem on Petitioner's case involving the severance of her parental rights. The irony was further increased when Judge Pro Tem Thomas C. Owens was appointed general counsel for the Kansas Department of Social Services shortly after he entered his Order severing Petitioner's parental rights.

In many respects, a severance of parental rights is akin to criminal proceedings, which ultimately may separate the convicted accused from society. Likewise, separating family members from each other's society requires as much or more protection for our nation's essential unit. Therefore parents should be entitled to a jury trial under the Sixth and Fourteenth Amendments. In even minor criminal cases defendants are entitled to trial by jury. What mother would not choose a term of imprisonment over the loss of her offspring? Although the code for protection of children is contained in the Juvenile Code and is thus denominated "Civil" in nature; in reality the declaration that parent is "unfit" to raise and nurture the children to which she has given birth carries a greater stigma and badge of inequity then even the most serious of crimes.

The fact that the statutory provisions for the severance of parental rights do not appear in the Kansas criminal code; but rather appear in the juvenile code is non-conclusive on the issue of whether the proceedings are in the nature of criminal proceedings. Many crimes in Kansas are codified in sections other than the criminal code (i.e., K.S.A. 65-4152 pertaining to drug paraphernalia).

Even forfeiture proceedings, which civil in nature, entitled the defendant to trial by jury when only a modest amount of property is at issue. Certainly, when the love and companionship of one's offspring is at issue the protection of trial by jury is paramount.

It is time that this Court recognize the tremendous impact parental rights severance proceedings have on the individuals involved and on our society as a whole. The family unit has been long recognized as the strength and backbone of our nation. If the family is the strength and backbone of our nation, then that sacred institution should be afforded the protection of trial by jury when the State seeks to put it assunder.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

*Attorney of Record

APPENDIX "A"

ISSUED:
FEBRUARY 9, 1990

COURT OF APPEALS OF KANSAS

No. 63,841

ELISA COSGROVE, Appellant, V. KANSAS STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, Appellee, and

No. 64,026

IN THE INTEREST OF L.C. and C.C., Children under the age of 18 years.

SYLLABUS BY THE COURT

1. PARENT AND CHILD – *Termination of Parental Rights.* Where there is a final termination of parental rights under the juvenile code, the sum total of the rights of the parent or parents in and to the child, as well as the rights of the child in and to the parent or parents, are completely terminated; there is a complete and final divestment of all legal rights, privileges, duties, and obligations of the parent and child with respect to each other.

2. SAME – *Termination of Parental Rights – Habeas Corpus Petition in Behalf of Child to Challenge Validity of Severance Proceeding – Right to File Petition Conferred on Child's Legal Guardian or Adoptive Parents.* After a final termination of parental rights under the juvenile code, the right to file a petition for writ of habeas corpus in behalf of the child in an effort to challenge to the validity of the severance proceeding is conferred on the child's legal guardian or adoptive parents and that right is not available to the parent or parents whose parental rights have been severed.

Appeal from Johnson District Court, Case No 63,841, JANETTE SHELDON, judge. Affirmed. Case No. 64,016, BILL E. HAYNES, judge. Affirmed. Opinion filed February 9, 1990.

Bryan E. Nelson, of Alder & Nelson, of Overland Park, for the appellant.

Richard G. Guinn, assistant district attorney, and Paul J. Morrison, district attorney, for appellee State of Kansas.

Robert T. Stephan, attorney general, and John W. Campbell, deputy attorney general, for appellee Kansas Department of Social and Rehabilitation Services.

Before ABBOTT, C.J., RULON, J., and RICHARD W. WAHL, District Judge Retired, assigned.

ABBOTT, C.J.: In 1986, Elisa Cosgrove's (and her former husband's) parental rights were severed as to L.C. and C.C. That decision was affirmed by this court on appeal in *In Re Lori C.* unpublished opinion No. 60,346, filed July 8, 1988, *rev. denied* 243 Kan. 778.

In March, 1989, Mrs. Cosgrove filed a petition for habeas corpus. She alleged that her children were being restrained in violation of their constitutional rights. She alleged several points of error, including that:

(1) She was denied her Sixth Amendment right to a jury trial;

(2) The Kansas Department of Social and Rehabilitation Services (SRS) manufactured evidence by psychological manipulation of her children;

(3) The civil severance trial was scheduled prior to her criminal trial, which put her in the position of either

testifying at the civil trial and revealing her defenses to the criminal trial, or not testifying at the civil trial to preserve her defenses, all in violation of her Fifth Amendment rights;

(4) Assistance provided by counsel was ineffective;

(5) The joint trial was error;

(6) Pro Tem Judge Owens should have been recused.

The court grants SRS's motion to dismiss the petition for habeas corpus. The trial court based its decision on three different factors, each of which alone would justify dismissal. First, the court said that Mrs. Cosgrove, having had parental rights severed, was not the real party in interest and had no standing to petition for the writ. Second, the court said that she was barred by res judicata because the issues were raised, or could have been raised, at the original trial. Finally, the court held that habeas corpus may not be used to review a civil judgment and "Ineffective assistance of counsel in a civil action does not present a valid cause of action."

Mrs. Cosgrove filed her notice of appeal on May 16, 1989.

On June 8, 1989, as part of the original severance of parental rights case, Mrs. Cosgrove filed a "Motion for Relief from Order Severing Parental Rights". She argued that Judge Owens' failure to recuse himself denied her a fair trial and due process. The court denied the motion on the basis that issues regarding Pro Tem Judge Owens were raised at trial and on appeal in the original case and were, therefore, res judicata. Mrs. Cosgrove timely appealed the trial court's dismissal of her motion. The cases were consolidated on appeal.

1. Writ of Habeas Corpus

Mrs. Cosgrove argued that she has standing to bring a petition for a writ of habeas corpus action because other Kansas cases recognize that habeas corpus is an appropriate remedy in child custody cases. She cites *Anderson v. Anderson*, 214 Kan. 387, 520 P.2d 1239 (1974), *Beebe v. Chavez*, 226 Kan. 591, 602 P.2d 1279 (1979); and *In re Adoption of Wilson*, 227 Kan. 803, 610 P.2d 598 (1980), as examples of habeas corpus petitions in child custody cases. In *Anderson* and *Beebe*, however, the action was brought by a parent of the child, seeking the return of the child. (*Wilson* only mentions habeas in dicta.) In the present case, Mrs. Cosgrove is no longer the children's legal mother. K.SA. 38-1581, et seq. concerns "termination of parental rights". The effect of termination of parental rights was explained in *In re Wheeler*, 3 Kan. App. 2d 701, 702, 601 P.2d 15, *rev. denied* 227 Kan. 927 (1979):

> "Where there is a termination of parental rights under the juvenile code [citation omitted], the sum total of the rights of the parent or parents in and to the child as well as the rights of the child in and to the parent or parents, are completely terminated; there is a complete and final divestment of all legal rights, privileges, duties and obligations of the parent and child with respect to each other."

K.S.A. 60-1501 sets forth when a petition for a writ of habeas corpus is proper:

> "Subject to the provisions of K.S.A. 60-1507 any person in this state who is detained, confined, or restrained of liberty on any pretense whatsoever, and any parent, guardian, or next friend for the protection of infants . . . physically present in this state may prosecute a writ of habeas

> corpus in the supreme court, court of appeals or the district court of the county in which such restraint is taking place."

This statute recognizes that a parent, or someone with rights in the child, may bring a habeas corpus petition for the child when the child's physical liberty, i.e., custody, is at issue, for the protection of the infant. This is how cases such as *Anderson* arose.

A similar situation was considered in *Helsel v. Blair Cty. Children & Youth*, 359 Pa. Super. 487, 519 A.2d 456 (1986), where a child's half brother filed a petition for a writ of habeas corpus relating to the custody of a child. Under Pennsylvania law, the half brother had no legal claim to the child. The court said:

> "A writ of habeas corpus was an accepted means of ascertaining and enforcing the right to custody of a child. [Citations omitted] However, the status of the petitioner and the timing of the petition are important factors in determining the propriety of this means of relief. 'To invoke the aid of habeas corpus for the purpose of determining custody of an infant, the petitioners for the writ must show a prima facie legal right to such custody.' *Commonwealth ex rel. Ebel et ux v. King., et al.*, 162 Pa. Super. 533, 58 A.2d 484 (1948)." 359 Pa. Super. at 493.

In the present case, Mrs. Cosgrove has no legal rights to her former children. That right to file a petition for protection of the child is now conferred on the children's legal guardians or adoptive parents.

In this appeal, Mrs. Cosgrove appears to present a novel argument. She maintains that her own liberty has been restrained. She notes that in *Santosky v. Kramer*, 455

U.S. 745, 753, 71 L.Ed 2d 599, 102 S.Ct. 1388 (1982), the Supreme Court recognized the "fundamental liberty interest of natural parents in the care, custody and management of their child[ren]." Her argument appears to be that K.S.A. 60-1501 allows a petition for a writ of habeas corpus when any person's "liberty interest is restrained" and that her own personal liberty interest is restrained. Therefore, she argues, she is not bringing the action for the protection of the child, but in her own right.

This stretches the concept of "liberty". Most Kansas cases concerning liberty at least implicitly refer to physical liberty. For instance, the child custody cases already discussed concern a child who is forced to live with another parent – the child's physical movement is restrained.

Mrs. Cosgrove makes a number of other arguments, based on older cases; however, we believe the Kansas cases cited for support are distinguishable in that they occurred before court unification and before the present legislation concerning the care of children.

We are of the opinion there are good policy reasons for not allowing a habeas corpus petition by a former parent whose parental rights have been severed. The goad in a termination of parental rights is to get the child in a healthy environment and, preferably, to find adoptive parents. If such petitions were allowed, adoptions would be impractical because the adoptive parents would be subject to a suit at any time. The need for finality in termination cases is overriding. Also, if the right of habeas corpus is extended to an intangible interest such as parental rights, it would, by analogy, be extended to

other "fundamental liberty interests", the scope of which could be enormous.

The United States Supreme Court, in *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 73 L. Ed 2d 928, 102 S.Ct 3231 (1982), considered whether a woman whose parental rights had been terminated could bring an action for a federal writ of habeas corpus. The petition was brought under 28 U.S.C. §225(a) (1982), which provides:

> "The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain and application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States."

The Court noted that, although the statute specifically refers to persons in "custody", modern cases have extended it to significant restraints on liberty. 458 U.S. at 508-09. (The scope of §2254(a), then, is essentially the same as the scope of K.S.A. 60-1501.)

The Court recognized the distinction between a habeas corpus petition filed for a child's interest from one filed for the parents' interests. "Ms. Lehaman simply seeks to relitigate, through federal habeas, not any liberty interest of her sons, but the interest in her own parental rights." 458 U.S. at 511. The Court, although recognizing a parent's liberty interest, held that federal courts have traditionally refused jurisdiction over family matters. 458 U.S. at 512. The Court also emphasized the State's strong interests in the finality of termination case:

> "The State's interest in finality is unusually strong in child-custody disputes. The grant of federal habeas would prolong uncertainty for children . . . possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home", under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions." 458 U.S. at 513-14.

Lehman shows that parents' fundamental liberty interest in raising their own children is a limited interest. See *Lassiter v. Department of Social Services*, 452 U.S. 18, 68 L. Ed 2d 640, 101 S. Ct. 2153, *reh. denied* 453 U.S. 927 (1981) (holding that the Fourteenth Amendment does not necessarily require appointment of counsel in every parental status termination case). Because the interest is limited, there is no constitutional reason to extend the right to bring a habeas corpus petition to parents who have had their rights terminated. The right to file a petition for writ of habeas corpus in behalf of the child in an effort to challenge the validity of the severance proceeding is conferred on the child's legal guardian or adoptive parents and that rights is not available to the parent or parents whose parental rights have been severed. This does not leave persons who have had their parental rights terminated without a remedy. K.S.A. 60-260(b)(6) is available.

2. K.S.A. 60-260(b)(6) Motion

Mrs. Cosgrove filed a motion for relief in the original case in which her parental rights were severed, pursuant to K.S.A. 60-260(b)(6). She argues a new trial is necessary because newly discovered evidence indicates that Pro Tem Judge Owens was prejudiced against her. She appeals the denial of this motion.

An appeal from an order denying a motion under K.S.A. 60-260(b) brings up for review only the order of denial itself and not the underlying judgment. *Ellis v. whittaker,* 10 Kan. App. 2d 676, 677, 709 P.2d 991 (1985). The granting of relief under K.S.A. 60-260(b) rests within the sound discretion of the trial court, and, on appeal, this court's scope of review is limited to determining whether the trial court's decision constituted an abuse of discretion. 10 Kan. App. 2d at 677.

Mrs. Cosgrove raised the recusal issue in the severance case and, on appeal, the Court of Appeals expressly held that she did not show error.

The matter was fully litigated. The trial court in this case was under no obligation to furnish a second opportunity to relitigate the identical issue. Thus, the trial court did not err in dismissing the petition for habeas corpus and in denying the motion for relief under K.S.A. 60-260(b)(6).

Affirmed.

APPENDIX "B"

Filed
'89 May – 8 P 2:36
CHIEF CLK OF THE DISTRICT COURT
By /s/ _____

TENTH JUDICIAL DISTRICT
DISTRICT COURT, JOHNSON COUNTY, KANSAS
CIVIL DEPARTMENT

ELISA COSGROVE, Petitioner, vs. KANSAS STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, Respondent.	)	Case No. 89-C-1527

JOURNAL ENTRY OF JUDGMENT

NOW on this 13th day of March, 1989, the above-captioned matter comes before the Court on respondent's Motion to Dismiss. Petitioner, Elisa Cosgrove, appears in person and by counsel, Bryan E. Nelson of the firm of Alder & Nelson of Overland Park, Kansas. Respondent, Kansas Department of Social and Rehabilitation Services appears by its counsel, John W. Campbell, Deputy Attorney General.

The court after reviewing the pleadings and hearing the arguments of counsel is prepared to rule in this matter. Pursuant to K.S.A. 60-252 and Supreme Court Rule 155, a statement of controlling facts and legal principle follows.

STATEMENT OF CONTROLLING FACTS

The paternal rights of petitioner as to Lori C. and Charles C., Jr. were severed pursuant to Court Order issued in the case captioned *In the Interest of Lori C. and Charles C., Jr., Each a Child under 18 Years of Age,* Johnson County Case Nos. 86-JC-0555, 86-JC-0556 and 84-JC-0290. This Order was affirmed by the Kansas Court of Appeals, Appellate Case No. 60,346 and review was denied by the Kansas Supreme Court on September 9, 1988.

STATEMENT OF CONTROLLING LEGAL PRINCIPLES

Petitioner seeks to void the judgment of the District Court referred to above. The Petitioner lacks standing to bring this action. As a matter of law, petitioner is not the parent, guardian or next friend of Lori C. or Charles C., Jr. Petitioner is not confined. Petitioner's status as the natural mother of Lori (and Charles C., Jr.) does not create standing. Petitioner is not a real party in interest as a matter of law and lacks standing to bring this action.

Further, petitioner is barred from bringing this action by the doctrine of *Res Judicata*. The issues raised by the petitioner were or could have been raised in the previous severance trial by appellee.

Petitioner's collateral attack of a civil judgment does not present a claim upon which relief can be granted. The court's habeas corpus powers will not be used to grant petitioner an additional review of her civil court judgment. Ineffective assistance of counsel in civil action does not present a valid cause of action.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that respondent's Motion to Dismiss is granted. The petition in this matter is dismissed with prejudice and costs to the petitioner.

/s/ Janette Sheldon
Janette Sheldon
District Court Judge
10th Judicial District

APPENDIX "C"

Filed
'89 JUN 29 A 9:29
CHIEF CLK. OF THE DISTRICT COURT
By /s/ _____

Child in Need of Care Proceedings
Under Chapter 38 of K.S.A.

In the Interest of	)	
LORIE COSGROVE	)	Case No.
A Child under the Age of 18 Years	)	86JC0556
Date of Birth: March 15, 1976	)	84JC0290
	)	Case No.
CHARLES COSGROVE, JR.	)	86JC0555
A Child under the Age of 18 Years	)	84JC0290
Date of Birth: November 1, 1979	)	Division 11

JOURNAL ENTRY

Now on this 26th day of June, 1989, the above-entitled matter comes on for hearing before the Honorable Bill Haynes, Judge presiding. Appearances are as follows: Richard G. Guinn and Scott C. Gyllenborg, Assistant District Attorneys; Elisa Cosgrove appears in person and by Bryan E. Nelson, retained attorney; Jon S. Willard, Court appointed guardian ad litem appears in person and on behalf of the minor children; Lawrence L. Ferree, III, legal counsel for the Johnson County Sheriff's Department appears in person and on behalf of Detective Frank Denning; Betty Barnett and Leigh Klein, Special Advocates (CASA). There are not other appearances.

Whereupon, the Court reviews the Court's record, and hears statements of counsel on Court's authority or

jurisdiction to hear motion captioned "Motion for Relief from Order Severing Parental Rights".

The Court finds from evidence:

1) That the State's Motion to Dismiss Motion for Relief from Order Severing Parental Rights is sustained for the reason that grounds stated in the Motion for Relief from Order Severing Parental Rights have previously been before the Court, rulings on those grounds sustained on appeal, and the Court now has no jurisdiction to grant the relief requested.

IT IS BY THE COURT SO ORDERED.

IT IS FURTHER BY THE COURT ORDERED that Jon S. Willard, Court appointed guardian ad litem, is hereby awarded the sum of One Hundred Dollars ($100) for services herein rendered and tax same as costs in Case No. 86JC0556.

IT IS FURTHER BY THE COURT ORDERED that costs in these proceedings are hereby taxed to Elisa Cosgrove; and that costs are due and payable to the Clerk of the District Court of Johnson County, Kansas, on the date of this hearing.

/s/ Bill Haynes
Judge, District Court
Division 11

APPENDIX "D"

April 24, 1990

IN THE SUPREME COURT

OF THE STATE OF KANSAS

ELISA COSGROVE, Appellant, vs. KANSAS STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, Appellee.	)	No. 63,841
IN THE INTEREST OF L.C. AND C.C., CHILDREN UNDER THE AGE OF 18 YEARS.	)	No. 64,026

You are hereby notified of the following action taken in the above-entitled cases.

Petition for Review –

Denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court
of Kansas

Supreme Court, U.S.
FILED
SEP 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-276

In The

Supreme Court of the United States

October Term, 1990

ELISA COSGROVE

Petitioner,

v.

KANSAS DEPARTMENT OF
SOCIAL AND REHABILITATION SERVICES

Respondent.

and

IN THE INTEREST OF L.C. AND C.C.
CHILDREN UNDER THE AGE OF 18 YEARS

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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for Respondent Kansas
State Department of Social
and Rehabilitation Services

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

I. DOES FEDERAL LAW REQUIRE THE KANSAS HABEAS CORPUS ACT, K.S.A. 60-1501, et seq. TO PROVIDE POST APPELLATE REVIEW OF CIVIL ACTIONS WHICH SEVER PARENTAL RIGHTS?

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In the Interest of Lori C. and Charles C., Jr.,
Each a Child under the Age of 18 Years, No. 60,346
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No. 90-276

In The

Supreme Court of the United States

October Term, 1990

ELISA COSGROVE

Petitioner,

v.

KANSAS STATE DEPARTMENT OF
SOCIAL AND REHABILITATION SERVICES

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT OF THE CASE

Lori C. and Charles C. Jr. are minors. In 1986 the Johnson County District Court found them to be children in need of care pursuant to K.S.A. 38-1583. This finding arose from the fact that they were terribly abused by the petitioner, their natural mother, and her husband, their natural father. The parental rights of petitioner and her husband were permanently severed. *In the Interest of Lori C. and Charles C., Jr., each a Child Under 18 years of Age,* Johnson County Case Nos. 86 JC 0555, 86 JC 0556 and 894 JC 0290.

On July 8, 1988 the Kansas Court of Appeals affirmed the district court. *In the Interest of Lori C. and Charles C., each a Child Under 18 years of Age,* Case No. 60-346, Ap-

pendix "A". The Kansas Supreme Court denied the petition for review. *In re Lori C.*, 243 Kan. 778 (1988).

All of the events complained of by petitioner occurred prior to 1987 and could have been raised in the original severance hearing and/or its appeal.

On December 13, 1988 petitioner filed a complaint in the United States District Court seeking to regain custody of Lori C. and Charles C., Jr. In response to a motion to dismiss petitioner dismissed her complaint. *Cosgrove v. Hayden, et al.*, No. 88-2608-S (D.Kan. March 3, 1989).

On February 9, 1989 petitioner filed suit in the Johnson County District Court seeking to regain custody of Lori C. and Charles C., Jr. under the Kansas Habeas Corpus Act, K.S.A. 60-1501, et seq. The district court dismissed the action on the grounds that under state law the petitioner had no standing; that res judicata barred relitigation of the custody dispute; and that the Act does not provide for post appellate review of a civil action based on ineffective assistance of counsel. *Cosgrove v. SRS*, Johnson County Case No. 89-C-1527 (May 9, 1989).

On July 19, 1989 the Johnson County District Court refused to reopen the original custody case. *In the Interest of Lori C. and Charles C., Jr., supra.*

The February and June district court were affirmed by the Kansas Court of Appeals. *Cosgrove v. SRS*, 14 Kan.App.2d 217, ___ P.2d ___, *review denied*, April 24, 1990.

The details of the original child abuse and custody case are protected from public view by K.S.A. 1989 Supp. 38-1506. In the hope that Lori and Charles may continue to recover from the abuse visited upon them, respondent will not at this time go into the details of the case. However, respondent will state that petitioner is an unfit parent.

Further, she received a fair trial in front of a fair and unbiased judge.

REASON WHY THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE KANSAS COURT OF APPEALS DOES NOT CONFLICT WITH ANY OTHER STATE COURT OF LAST RESORT, ANY UNITED STATES COURT OF APPEALS, OR THE UNITED STATES SUPREME COURT.

If petitioner had valid concerns regarding the state court system's process by which her parental rights were severed, she should have petitioned this Court within the ninety days of the conclusion of the original state appellate case in 1988. *In re Lori C., supra.* She chose not to appeal the original action. She can not now resurrect that case by means of *Habeas Corpus.* This is not a proper 28 U.S. 1257 appeal.

Habeas corpus does not provide post appellate relief in state parental severance proceedings under either Kansas or federal law. *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979); *Lehman v. Lycoming County Children's Services,* 458 U.S. 502, 511, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982).

There is no requirement for the state to provide post appellate review of parental severance cases. Since 1986 over a dozen Kansas judges, trial and appellate, have examined the issues raised by petitioner. Not one has held that petitioner should regain custody of Lori and Charles.

It is time to end this case. The children's lives have been disrupted enough. They need a permanent home with fit parents.

CONCLUSION

This petitioner should be denied. It is untimely and does not properly raise any federal law questions.

Respectfully submitted,

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NOT DESIGNATED FOR PUBLICATION

No. 60,346

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of Lori C. and Charles C.,
Each a Child under 18 Years of Age.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS C. OWENS, judge pro tem. Opinion filed July 8, 1988. Affirmed.

David K. Fromme, of Shawnee, for appellant mother.

Richard G. Guinn, assistant district attorney, *Dennis W. Moore*, district attorney, *Robert T. Stephan*, attorney general.

Before REES, P.J., WILLIAM D. CLEMENT, District Judge, assigned, and FREDERICK WOLESLAGEL, District Judge Retired, assigned.

Per Curiam: E. C., the natural mother of Lori C. and Charles C. Jr., appeals from the trial court's termination of her parental rights. The natural father, C. C. Sr., filed a timely notice of appeal but failed to docket the appeal. His appeal is therefore deemed abandoned. Supreme Court Rule 5.051 (1987 Kan. Ct. R. Annot. 22).

The core contention asserted in this appeal is that, as a matter of law, the evidence before the trial court when it ordered severance was insufficient to meet the statutory requirement that there be "clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for [the] child and the conduct or condition is unlikely to change in the foreseeable future." (K.S.A. 38-1583[a].)

E. C. complains that the trial court's finding of parental unfitness is not supported by substantial competent evi-

dence of clear and convincing quality. She asserts that the trial judge focused on evidence regarding her past actions rather than her conduct and the conditions present at the time of severance.

When called upon to adjudicate a parental severance request, a trial judge bears an awesome burden of evaluation and prognostication. In the performance of his or her responsibility, it is unrealistic and unfair to the parent and the trial judge to restrict the trial judge to "freeze frame" consideration of the evidence. To avoid speculation in its purest form, the trial judge must be allowed to found his or her evaluation and prognostication upon the parent's "track record" while keeping in mind the particular needs of the child. Whether staleness, infrequency of repetition, or nonrepetition causes past acts of parental misconduct to be of diminished or of no value as indicators of present ability and future conduct necessarily must be for evaluation by the factfinder, the trial judge. We can reverse the trial judge's decisions in cases of the sort before us only if we are persuaded and conclude that there is no evidence that the trial judge could have found which was clear and convincing evidence that the parent is presently unfit and is likely to remain unfit in the foreseeable future.

K.S.A. 38-1583 lists factors to be considered by the trial court in making a determination as to severance. Any one of the factors, standing alone, may establish grounds for the termination. K.S.A. 38-1583(e). The trial court considered the majority of factors relevant in the present case and made findings with regard to each factor. Testimony from Lori C., Charles C. Jr., and numerous professionals supports the trial court's finding that E. C. had engaged in acts inimical to an acceptable parental relationship and had participated "in a peripheral manner" in unacceptable parental conduct by C. C. Sr. There was an abundance of testimony that Lori C. displayed multiple personality dis-

order, and of Charles C. Jr.'s obsession with violent behavior and emotional maladjustment. The trial court also found an "aura of ongoing emotional instability" on the part of both parents in light of their conduct toward the children.

E. C. cites *In re Reed*, 8 Kan. App. 2d 602, 663 P.2d 675 (1983), in support of her contention that the severance was based on her past actions rather than her conduct and the conditions present at the time of severance. In *Reed*, the children were found to be "deprived" (children in need of care) and were placed in SRS custody. At the hearing following a request for termination of parental rights one year later, no admissible evidence addressed parental fitness or established the condition in the home in the one year period between the trial court's child in need of care determination and the severance hearing. The *Reed* court consequently found that there was no substantial competent evidence to support termination of parental rights. Unlike *Reed*, however, the present case is replete with testimony from numerous professionals who observed, evaluated, and worked with E. C. and the children during the period of time between the child in need of care hearing and the severance hearing. During this time, the children exhibited ongoing emotional problems, which the professionals attributed to parental misconduct and the family environment, and reacted adversely following visits with E. C. E. C. continued to deny that any misconduct occurred and chose to work with a therapist who thought E. C. had no problems once E. C. separated from C. C. Sr. The therapist refused to set treatment goals. There was testimony that this was not in compliance with SRS's social agreement which required that E. C. show "durable changes in the counseling situation."

We are unable to conclude that the trial court lacked substantial competent evidence of a clear and convincing

quality to support termination of parental rights. (See *In re J. G.*, 12 Kan. App. 2d 44, 51, 734 P.2d 1195, *rev. denied* 241 Kan. ___ [1987].)

E. C. further argues that she was denied a meaningful independent evaluation of the children by a professional of her choosing and that she was substantially prejudiced as a result. She states that, when the severance petitions were filed in May 1986, both parents orally requested an independent evaluation of the children by a professional of their choosing, but the court denied their request. The only evaluation request documented in the record on appeal is C. C. Sr.'s written motion filed September 25, 1986. That motion was set for hearing on September 29, 1986, and was granted by the trial court.

In the absence of some showing of record that E. C. requested and was denied an independent evaluation, we are unable to address the issue on appeal. "The burden is upon the appellant to designate a record sufficient to present its points to the appellate court and to establish the claimed error. *State ex rel. Ludwick v. Bryant*, 237 Kan. 47, Syl. ¶ 6, 697 P.2d 858 (1985)." *Johnson v. Baker*, 11 Kan. App. 2d 274, 277, 719 P.2d 752 (1986).

E. C. next contends that the trial court erred in admitting testimony from Dr. Joe Weaver regarding statements Lori C. made while under hypnosis. The trial court admitted the challenged testimony on the ground that it was not offered to prove the truth of what Lori C. said under hypnosis, but rather to show how Dr. Weaver arrived at his conclusions.

There is no indication that the trial court considered Dr. Weaver's testimony for any purpose other than the limited purpose for which it was admitted, that is, to show how Dr. Weaver arrived at his diagnostic conclusion that Lori C. suffered multiple personality disorder. In light of the testimony of Dr. Bill Graham and social worker Janet

Banker, E. C. has not shown that she was prejudiced by the admission of Dr. Weaver's testimony and any error would be harmless error. "Harmless error is error which does not prejudice the substantial rights of a party. It affords no basis for a reversal of a judgment and must be disregarded." *Hagedorn v. Stormont-Vail Regional Med. Center*, 238 Kan. 691, 701, 715 P.2d 2 (1986).

E. C. finally contends that the administrative judge erred in failing to order recusal of the judge pro tem who conducted the termination hearing. The natural father submitted and filed an affidavit pursuant to K.S.A. 1987 Supp. 20-311d, requesting recusal of the judge. At the hearing on the father's affidavit, counsel for E. C. stated that she did not join in the affidavit. E. C.'s contention on appeal that the judge pro tem should have been recused is inconsistent with her position in the trial court. "A party cannot on appeal be permitted to change its theory or raise new issues not previously presented to the trial court, or inconsistent with the position taken before the trial court. [Citation omitted.]" *Baugher v. Hartford Fire Ins. Co.*, 214 Kan. 891, 901, 522 P.2d 401 (1974). E. C.'s express refusal to join in C. C. Sr.'s affidavit precludes her claim of error on appeal.

In this case, which obviously is painful for all concerned, we are unable to conclude that there is no evidence that the trial judge could have found which was clear and convincing evidence that E. C. was presently unfit and was likely to remain unfit in the foreseeable future. The case has been well and thoroughly presented and considered at both the trial and appellate levels. As counsel are aware, it has not been our role to retry it.

Affirmed.